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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968

No. 752

MILTON FRANK ALLEN PUBLICATIONS, INC.
Petitioner,

vs.

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC.
Respondent.

SECOND PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MILTON FRANK ALLEN
Publications, Inc.
by: MILTON F. ALLEN
President

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This Court denied the Petition for Rehearing of Petition for Writ of Certiorari To The Supreme Court of Georgia on February 24, 1969.

Petitioner notes that the interest in finality of litigation, as expressed in Supreme Court Rule 58, under which consecutive petitions for rehearings, and petitions for rehearing that are out of time, will not be received, must yield where the interest of justice would make unfair the strict application of that rule. *United States v.*

Ohio Power Co., 353 U.S. 98, IL ed 2d 683, 77 S Ct 652 (1957), reh den 353 U.S. 977, IL ed 2d 1139, 77 S Ct 1053.

Petitioner respectfully and earnestly requests the Court to reconsider the aforsesaid denial and in support of such request submits the following for the Court's consideration.

CONTRACT MUST BE CLEARLY AGAINST PUBLIC INTEREST TO BE VOID

Ga. Code 2-504 Construction. Contracts should be declared void as against public policy only in cases free of doubt, 117 Ga. 600 (16), 2 Ga. App. 127 (3), 9 Ga. App. 116; 9 Ga. App. 797 (3)

"When import of contract doubtful, prejudice to public interest must clearly appear before transaction declared void as contrary to public policy." 78 Ga. 413, 2 Ga. App. 127 (4)

"Prejudice to public interest must clearly appear to void transaction." 78 Ga. 514, 30 Ga. App. 643

WERE ADDITIONAL SUBSTANTIAL GROUNDS POSSIBLY OVERLOOKED IN THIS REGARD?

(1) Evidence in trial court shows two out-of-state witnesses identified as membership soliciting agents on commission raises question whether or not delegation of this function was a normal trade practice rather than abrogation of Directors responsibilities in light of

(a) Day by day state travel required.

and if delegation was necessary considering:

(b) Petitioner's investment of the greater part of approximately $600,000.00 over an 18 year period (not counting salaries of Petitioner's officers) out of Petitioner's 75% gross—
and with Respondent having no assets (or very minute and insufficient) when Membership Solicitation Contract was entered into March 26, 1946 and receiving 25% net of membership dues from efforts by Petitioner under this contract in the approximate amount of $125,000.00.

—as shown by Petitioners Federal Tax Returns in evidence for the stated 18 years.

(2) The decision of the State Court cited on Page 24 of the Petition for Writ of Certiorari states in the last sentence on the second full paragraph that ". . . where a member's dues are $10 per year, the Association gets only $1.00 from these dues: . . ."

Possibly overlooked is the fact that the correct evaluation is that Respondent gets 25% net of dues under Membership Contract . . . and that for the additional $1.50 paid out under the separate Publication Contract, the Respondent Association gets an equivalent value in an Official Organ furnished altogether at the Petitioner's expense—a cost that Respondent would have had to otherwise incur — so that the Membership Contract considerations 75% gross to Petitioner — 25% net to Respondent raises a question of reasonableness rather than being clearly void as against public policy.

(3) Petitioner suggests reconsideration also as to reasonableness of the protective clauses in the light of Petitioners very large above investment over a long period of time and that without same, Petitioner, having taken all the risk, liability, effort and expense on commission basis – having built up the largest association membership in the United States for Respondent – could be put out of business overnight by arbitrary action by Respondent to raise or lower dues at will . . . and considering that:

> Respondent took no risk, liability, effort or expense in entering into this solicitation contract in 1946.

WAS DUE PROCESS DENIED PETITIONER ON FOLLOWING ADDITIONAL GROUNDS?

"Contract partly executed will be enforced as against corporation plea of ultra vires where it received benefits thereunder in its corporate capacity." 50 Ga. App. 309 (178 S.E. 185)

"*No* application of doctrine of ultra vires acts will allow corporation to retain and use benefits of contract and at same time refuse to comply with its part of contract under which they were obtained." (Emphasis added). 209 Ga. 665, 669 (75 S.E. 2d 168)

"Party to contract, generally one who is not, cannot attack it as ultra vires." 8 Ga. App. 235 (2) (68 S.E. 1010)

CONCLUSION

Petitioner submits that under the limitation of Director authority allowed under Ga. Code Title 22—1864 and Respondents' By-Law in compliance thereto validating this contract and for the foregoing and previously presented reasons the delegation of the solicitation function was reasonable and not against public policy . . . and that it is not in the interest of justice nor according to protection guaranteed under the U.S. Constitution and law cited that Petitioner's 18 year old membership sales agency be destroyed by the misapplication of law and failure of due process as submitted to this court by Petitioner.

Petitioner therefore prays that the court reconsider its previous rulings and grant the Writ of Certiorari.

Respectfully submitted,

MILTON FRANK ALLEN
Publications, Inc.

MILTON F. ALLEN
President

CERTIFICATE OF PETITIONER

I, Milton F. Allen, President of the above named petitioner, do hereby certify that the second petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58 Paragraph 4 of the Rules of this Court . . . with the noted application.

MILTON FRANK ALLEN
Publications, Inc.

by: MILTON F. ALLEN
President

CERTIFICATE OF SERVICE

The undersigned Petitioner in the foregoing matter does hereby certify that it has on this date served the Second Petition for Rehearing of Petition for Writ of Certiorari upon Respondent by depositing copies thereof in a United States Post Office, with first class postage prepaid, addressed to Respondent's counsel, with first class postage prepaid, addressed to Respondent's counsel of record, James A. Mackay, Esq., 500 First National Bank Building, Decatur, Georgia, and Cleburne E. Gregory, Jr., Esq., 1000 Fulton Fulton Building, Atlanta, Georgia 30303.

DATED this 19th day of March, 1969.

MILTON FRANK ALLEN
Publication, Inc.

MILTON FRANK ALLEN
President